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SUPREME COURT, U.S.

NO. 81-5390

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MARNELL SMITH

Petitioner

v.

EDWARD C. MORRIS

Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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QUESTION PRESENTED

WAS PETITIONER EFFECTIVELY REPRESENTED BY COUNSEL?

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STATEMENT OF THE CASE

The respondent is in general agreement with the Statement of Facts set forth by petitioner but certain additions need to be made to correct inaccuracies and omissions. For uniformity purposes references to the trial transcript will be designated (T.T.) and references to the transcript of the habeas corpus hearing will be designated (H.T.).

Prior to his examination, Dr. Dimitris not only warned petitioner that any statements by him during the examination could be used against him, but also advised petitioner that he could consult with his attorney (H.T. 177) and made it clear that petitioner could stop the interview at any time. (H.T. 178).

Dr. Wendall Pile did not testify that he had no training in forensic psychiatry, but instead stated that he had had no formal training in forensic psychiatry. (H.T. 13). Dr. Pile testified that he is called upon very frequently to do forensic evaluations. (H.T. 25). While Dr. Pile did not give petitioner any warnings about his statements, petitioner was warned by his attorney not to discuss any prior crimes with anyone, (H.T. 235, 236, 246, 259), and petitioner was aware of his rights when he told Dr. Pile that his attorney had advised him not to discuss any instances not related to the present offense. (H.T. 26, 27). Dr. Pile did not thereafter question petitioner about any prior instances, but later petitioner voluntarily revealed the information about the school bus incident. (H.T. 27). The petitioner has a high school

education and his attorney found that petitioner could understand what he was being advised. (H.T. 226).

Dr. Showalter never testified that Dr. Pile's diagnosis was clinically unsupported. He testified that he did not believe the examination by Dr. Pile would be sufficient because of the limited time available (H.T. 92), however, he was unwilling to say that it could not be done. (H.T. 127).

The record shows that petitioner's attorneys did attempt to contact Dr. Pile after his examination to discuss his diagnosis, but because Dr. Pile was out of the country this information was supplied by Dr. Pile's associate, Dr. Cox. (H.T. 22).

ARGUMENT

PETITIONER DID RECEIVE THE ADEQUATE ASSISTANCE OF COUNSEL.

A. The Trial Court Applied the Correct Standard.

Petitioner first asserts that this Court should address again the standard for ineffective assistance of counsel, pointing out the dichotomy in the test utilized by the Supreme Court of Virginia and the Fourth Circuit Court of Appeals. The Virginia Supreme Court uses the "farce and mockery" standard, Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1974), whereas, the Fourth Circuit uses the "range of competency" test, Marzullo v. Maryland, 561 F.2d 540 (1977).

It appears that not all courts follow the same test for determining competency of counsel as three circuits continue to adhere to the "farce and mockery" standard. See, e.g., Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir.), cert. denied,

434 U.S. 845 (1977); Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977); United States v. Madrid Ramirez, 535 F.2d 125 (1st Cir. 1976). While it may be necessary for this Court to announce a single constitutional rule for judging competency of counsel, this case does not present the appropriate vehicle for so doing. In ruling on the petition in this case the trial court found that petitioner received adequate assistance of counsel under both the "farce and mockery" standard and the "range of competency" standard. See, Findings of Fact, p. 2 of Appendix attached to petition. Consequently, any undertakings to delineate which test should be utilized would have no practical effect upon this case since both tests were applied.

Petitioner urges that even though the trial court applied the "range of competency" test to this case, the Court did not appreciate the special significance of a capital case. Nothing in the record supports such an assertion. Every defendant is entitled to effective representation regardless of the punishment which may be imposed. What is required of counsel is normal not exceptional representation. Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

B. Counsel Did Protect Petitioner's Fifth Amendment Privilege Against Self-Incrimination.

At petitioner's request the trial court ordered a psychiatric examination by Dr. Pile. Dr. Pile was the psychiatrist chosen by the petitioner. (H.T. 261). Prior to any examination

petitioner's attorney advised him on more than one occasion not to discuss the present offense or any other offenses with anyone. (H.T. 235, 236). The attorneys felt that petitioner understood this advice (H.T. 226), and had no reason to believe petitioner would not follow their advice. (H.T. 237).

Not only was petitioner warned not to discuss these events by his attorneys, Dr. Dimitris prior to his examination also warned petitioner that any statements could be used against him. (H.T. 177). Further, it is abundantly clear that petitioner understood and appreciated the fact that he had been warned not to discuss these events when he was examined by Dr. Pile. During the course of Dr. Pile's examination, petitioner specifically told Dr. Pile that his attorneys had warned him not to discuss the events. (H.T. 26, 27). It is equally clear that notwithstanding his rights, petitioner voluntarily revealed the information concerning the school bus incident. (H.T. 27).

This Court has recognized that a person may waive his rights against self-incrimination. Miranda v. Arizona, 384 U.S. 436 (1966); Estelle v. Smith, ___U.S.___, 68 L.Ed.2d 359 (1981). The records in this case stand uncontradicted that petitioner had been warned of his rights and voluntarily waived his rights to silence. Petitioner has never denied that he was warned of his rights or that he voluntarily waived them. It is to be noted that petitioner was not called to testify at the habeas hearing.

The trial court has found as a fact that petitioner was adequately warned and voluntarily waived his right to self-incrimination. Findings of Fact, p. 3.

Petitioner suggests that the attorneys should have accompanied him to the examination to insure he would remain silent. As this Court noted, however, in Estelle v. Smith, supra, there is no right to have an attorney actually present during the examination. ___U.S.___, 68 L.Ed.2d at 374, n. 14. Since the record is uncontradicted that petitioner fully recognized his right to remain silent during the conduct of the examination, no purpose could have been served by the attorney accompanying petitioner to the examination.

Petitioner asserts that counsel's advice not to discuss the circumstances of the present offense with the psychiatrist would have made it impossible for a psychiatric examiner to render an opinion regarding the petitioner's mental state at the time of the offense. Dr. Dimitris testified, however, that it is not essential that a person tell the psychiatrist about the events in order to render an opinion, and in fact ninety-five percent of the people he examines do not furnish this type of information. (H.T. 180, 181).

At the time of petitioner's trial his counsel was aware of the decision in Gibson v. Commonwealth, 216 Va. 412 (1975), which held that there was no physician-patient privilege in a criminal prosecution in Virginia. Accordingly, petitioner's attorneys advised him not to discuss the events in order to protect him.

The petitioner cites Gibson v. Zahradnick, 518 F.2d 75 (4th Cir. 1978), in support of his allegation that counsel was ineffective in protecting his right against self-incrimination. Of course this decision was not rendered until July 19, 1978, some eight months after petitioner's trial. It can hardly be said that counsel was ineffective in not following a decision which had not yet been rendered.

C. Counsel Was Effective At The Sentencing Hearing

It must be noted that this case is completely inapposite from Estelle v. Smith. In this case it was the petitioner who sought the examination by Dr. Pile, and it was the petitioner who brought out on examination Dr. Pile's diagnosis. (T.T. 936). The record shows that on cross-examination by petitioner's attorney, Dr. Pile was asked several short questions concerning his examination of petitioner, and then petitioner's attorneys conferred one with another. (T.T. 395-396). It was after this conference between the attorneys that Dr. Pile was asked about his diagnosis.

At the plenary hearing petitioner's attorney testified that he could not then recall the specific reason why Dr. Pile's diagnosis was elicited. (H.T. 239, 267). During his cross-examination of Dr. Pile, petitioner's counsel attempted to show that petitioner was suffering from some mental condition at the time of the crime (T.T. 937, 938, 940), and that such condition could be treated. (T.T. 938, 939). This same line of questioning,

was repeated on the cross-examination of Dr. Dimitris (T.T. 948, 950, 951). During argument to the jury petitioner's counsel specifically argued that petitioner was suffering from an illness that he could not help (T.T. 1082, 1083), and asked the jury to give petitioner the opportunity to get treatment for his illness. (T.T. 1084-1086). The trial court found that counsel elicited Dr. Pile's testimony in an effort to establish that petitioner was suffering from a mental illness which could be treated and since this was the only reasonable defense, counsel's cross-examination was the product of informed, professional deliberation, and thus competent. Findings of Fact, pp. 7, 8. Even though some of Dr. Pile's testimony was prejudicial to petitioner, this is not sufficient to find counsel to be ineffective. See, Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978).

The record establishes that the only reasonable defense for petitioner in the present case was to attempt to convince the jury that petitioner was suffering from an illness for which he was not responsible, and that such illness could be treated. That counsel's attempt was unsuccessful is not the measure of whether counsel was effective. In this same vein, the Eighth Circuit said in Robinson v. United States, 448 F.2d 1255, 1256 (1970):

> "Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When that judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel."

D. Counsel Adequately Investigated The Mental Mitigating Abnormalities.

Dr. Dimitris testified that petitioner's attorneys were very eager to know his findings and any extenuating circumstances that could be of help. (H.T. 170). The attorneys were not satisfied with basics (H.T. 189). Petitioner's attorneys testified that he wanted to establish mental mitigation. (H.T. 234).

The record shows that neither Dr. Pile nor Dr. Dimitris had called to their attention the specific language of § 19.2-264.4B. (H.T. 21, 188). This fact, however, does not mean that counsel did not conduct an adequate investigation.

Both Dr. Pile and Dr. Dimitris, however, testified that their examinations were sufficiently broad enough to allow them to render an opinion on the issues of whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and whether at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. As to each question both doctors testified that they were unable to find evidence to support either question. (H.T. 32, 33, 215, 216). Consequently, whether counsel specifically brought the language of the statute to the attention of the doctors, petitioner suffered no prejudice since neither doctor found evidence of either mental mitigating abnormality.

Petitioner relies upon Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), for the proposition that competent counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed. In Jackson v. Cox, 435 F.2d 1089 (4th Cir. 1970), the court apparently limited Coles, by distinguishing it as a case of virtually complete lack of investigation that was not controlling in a case where there were shortfalls in investigation, yet counsel had performed more than a "perfunctory" investigation.

The petitioner further relies upon the cases of Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978), and Brennan v. Blankenship, 472 F. Supp. 149 (W.D.Va. 1979). Respondent submits that these cases are inapposite to the facts in the present case. In Wood the court found counsel ineffective for the reason that he completely failed to explore an insanity defense when evidence was known to counsel which indicated such a defense. In Brennan, the court concluded that counsel was ineffective in failing to follow up on a psychiatrist's opinion that the defendant was insane at the time of the crime. In the present case petitioner's counsel took steps to explore petitioner's mental condition and any matters in mitigation.

In its Findings of Fact, the trial court found that petitioner suffered no prejudice from counsel's failure to direct the psychiatric examinations towards the mental mitigating abnormalities. The record is uncontradicted that petitioner

did not in fact possess either of the mental mitigating abnormalities.

In the last analysis, all courts recognize that the performance of counsel must fall below a minimum, not just an abstract "norm". There must be serious derelictions. A shortfall by defense counsel that is perceptible but is modest rather than egregious is no basis for a judicial interposition. Any claim of ineffectiveness must turn not on abstractions as to duty, but on an appraisal of consequences. As noted in United States v. DeCoster, 424 F.2d 196 (D.C.Cir. 1979):

> "The claimed deficiency must fall measurably below accepted standards. To be 'below average' is not enough, for that is self-evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 214.

CONCLUSION

The trial court has concluded that petitioner was afforded effective assistance of counsel under two different standards. The record amply supports the finding of the trial court. Accordingly, respondent submits that the petition for writ of certiori should be denied.

Respectfully submitted,

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